BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Petition of AT&T Communications of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)

ISSUE DATE: November 18, 2003

DOCKET NO. P-442, 421/IC-03-759

ORDER RESOLVING ARBITRATION ISSUES AND REQUIRING FILED INTERCONNECTION AGREEMENT

PROCEDURAL HISTORY

Since 1997, AT&T Communications of the Midwest, Inc., and TCG Minnesota, Inc. (collectively, AT&T) have operated pursuant to an interconnection agreement (ICA) with US WEST Communications, Inc. (US WEST), and its successor Qwest Corporation (Qwest). That agreement expired in 2002, but AT&T and Qwest agreed to continue to honor its terms as they worked to revise it. For purposes of complying with the timelines of the federal Telecommunications Act of 1996 (1996 Act),[1] AT&T and Qwest stipulate that they began to negotiate a new agreement on December 19, 2002.

On May 27, 2003, after the parties failed to reach agreement on some issues, AT&T petitioned the Commission to arbitrate these matters. The petition included a list of issues, numbered from 1 to 36, developed jointly by AT&T and Qwest.

On June 2, 2003, the Minnesota Department of Commerce (the Department) intervened in this matter.[2]

On June 11, 2003, the Commission issued its ORDER ASSIGNING ARBITRATORS, referred all issues for arbitration before Administrative Law Judges (ALJs) Kathleen D. Sheehy and Steve M. Mihalchick of the Office of Administrative Hearings. The ALJs granted intervener status to the Office of Attorney General's Residential and Small Business Utilities Division (OAG-RUD). The ALJs granted observer status[3] to MCI; Onvoy, Inc.; Sprint; Time Warner Telecom of Minnesota, LLC; a coalition in independent telephone companies called the Minnesota Independent Coalition (MIC); and a coalition of competitive local exchange carriers (CLECs) called the CLEC Coalition.

[1] Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[2] The Department's petition to intervene is granted as a matter of right. Minn. Stat. § 216A.07, subd. 3; Minn. Rules part 7812.1700, subp. 10.

[3] Observer status is described at Minn. Rules part 7812.1700, subp. 10.

On July 14-15, 2003, the ALJs conducted arbitration hearings in St. Paul, Minnesota.

On August 19, 2003, the ALJs filed their Arbitrators' Report making recommendations for addressing 21 issues, the remainder having been resolved by the parties.

On August 28, 2003, the Commission received exceptions to the Arbitrator's Report from AT&T, the Department and Qwest.

The Commission met on September 11, 2003 to consider this matter. The record of this case closed on that date.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

A. Procedure

The 1996 Act was designed to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The 1996 Act opens markets by requiring each incumbent local exchange carrier (ILEC) to –

- permit CLECs to purchase its services at wholesale prices and resell them to customers;
- permit CLECs to interconnect with its network on just, reasonable and nondiscriminatory terms; and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to CLECs without requiring the CLEC to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[4]

A CLEC desiring to provide local exchange service can seek agreements with an ILEC related to interconnection with the ILEC's network, the purchase of finished services for resale, and the purchase of the ILEC's UNEs.[5] If the ILEC and the CLEC cannot reach agreement, either party may ask the State commission to arbitrate unresolved issues and to order terms consistent with the 1996 Act, provided that they make such a request between the 135th to the 160th day after the CLEC asked to open negotiations with the ILEC.[6] In particular, parties may ask the Commission to determine the total element long-run incremental cost (TELRIC) of UNEs, interconnection, and methods of obtaining access to UNEs.[7] The Commission has resolved various interconnection disputes through arbitration.[8]

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[4] 47 U.S.C. § 251(c).

[5] 47 U.S.C. §§ 251(c), 252(a).

[6] 47 U.S.C. § 252(b).

[7] 47 C.F.R. §§ 51.501, 51.505.

[8] See, for example, *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S WEST Communications, Inc., Pursuant to Section 252(b) of*

B. Decision Standard

In resolving the issues in this arbitration and imposing conditions, the Commission must (1) ensure that the resolution meets the requirements of § 251 of the 1996 Act, including any legally enforceable regulations prescribed by the Federal Communications Commission (FCC) pursuant to § 251; (2) establish any rates for interconnection, services or network elements according to § 252(d) of the 1996 Act; and (3) provide a schedule for implementation by the parties.[9]

The Commission may also establish and enforce other requirements of state law when addressing issues related to intercompany agreements under § 252.[10] The Minnesota Legislature directs the Commission to encourage, among other things, economically efficient deployment of infrastructure for higher speed telecommunication services, fair and reasonable competition for local exchange telephone service, improved service quality, and customer choice.[11] In addition, the Commission must adopt policies "using any existing federal standards as minimum standards and incorporating any additional standards or requirements necessary to ensure the provision of high-quality telephone services throughout the state."[12] These policies must facilitate the kind of interconnection that "the commission considers necessary to promote fair and reasonable competition"[13] and, in particular, must "prescribe appropriate regulatory standards for new local telephone service providers that facilitate and support the development of competitive services...."[14]

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the Federal Telecommunications Act of 1996, Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729 (*Consolidated Arbitration*); *In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements,* Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 (*Generic Cost Case*); *In the Matter of the Commission Review and Investigation of Qwest's Unbundled Network Elements Prices,* Docket No. P-421/CI-01-1375; *In the Matter of the Commission's Review and Investigation of Certain Unbundled Network Element Prices of Qwest*, Docket No. P-442, 421, 3012/M-01-1916.

[9] 47 U.S.C. § 252(c).

[10] 47 U.S.C. §§ 251(d)(3), 252(e)(3), 253(b), 261 and 601(c)(1); *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996) (*Local Competition First Report and Order*) at ¶¶ 233, 244.

[11] Minn. Stat. § 237.011.

[12] Minn. Stat. § 237.16, subd. 8(a).

[13] *Id.* at subd. 8(a)(2).

[14] *Id.* at subd. 8(a)(6).

To these ends, the Legislature authorizes the Commission to remedy unreasonable or insufficient services or omissions[15] by making any just and reasonable order necessary, up to and including revoking a carrier's authority to provide service.[16]

In short, the Commission must impose terms and conditions in this proceeding that are just, reasonable, nondiscriminatory and fair to both the new entrants and the incumbent, consistent with the requirements of federal and state law.

II. FUTURE PROCEEDINGS

The 1996 Act requires parties to submit "any interconnection agreement adopted by negotiation or arbitration . . . for approval to the State commission."[17] The State commission must then "approve or reject the agreement, with written findings as to any deficiencies," within 90 days as to a negotiated agreement and 30 days as to an arbitrated contract.[18]

The 1996 Act does not establish any deadline by which parties must submit a final contract. It leaves this to State commissions, directing them to provide in their arbitration decisions a schedule for implementation.[19]

The Commission will require the parties in this arbitration to submit their final contracts, containing all arbitrated and negotiated terms, within 30 days of this Order. The parties shall put their entire contracts together and craft any additional language that the Commission has not specifically ordered in this arbitration.

The approval proceeding will enable the Commission to (1) review, for the first time, provisions arrived at through negotiations; (2) make any necessary adjustments to the arbitrated terms; and (3) ensure that the final contract language comports with the Commission's decisions in this arbitration. The Commission will review the entire agreement for compliance with the relevant law and consistency with the public interest as required by the 1996 Act.[20]

SPECIFIC FINDINGS AND CONCLUSIONS

AT&T and Qwest initially identified 36 unresolved issues for arbitration. Further negotiations reduced this list to the following 21 issues:

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[15] Minn. Stat. §§ 216B.23, 237.081.

[16] Minn. Stat. § 237.16, subd. 5.

[17] 47 U.S.C. § 252(e)(1).

[18] 47 U.S.C. § 252(e)(4).

[19] 47 U.S.C. § 252(c).

[20] See 47 U.S.C. § 252(e).

GENERAL TERMS

Issue No. 1: How should tariffed services be made available to AT&T?

INTERPRETATION AND CONSTRUCTION

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DEFINITIONS

Issue No. 3: How should a "Tandem Office Switch" be defined?

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Issue No. 16: Should the rate for Private Line Transport Service include a relative use factor?

Issue No. 17: Should (and if so, how should) costs for two-way trunking be shared?

Issue No. 19: How should the parties calculate the ratio of terminating to originating traffic?

Issue No. 21: How should calls be billed where no Customer Party Number is passed on?

COLLOCATION

Issue No. 22: How should Qwest handle equipment or property abandoned by AT&T?

UNBUNDLED NETWORK ELEMENTS

Issue No. 23: How frequently should Qwest provide loop audits to AT&T?

Issue No. 24: What is Qwest's obligation to construct UNE facilities for AT&T?

SERVICE PERFORMANCE

Issue No. 26: What wholesale service quality standards should the agreement include?

BILLING

Issue No. 27: What format(s) should the parties use for the submission of bills to each other?

Issue No. 30: How should the parties bill for traffic without Carrier Identification Codes?

Issue No. 33: How should the parties compensate each other for alternatively billed calls?

Issue No. 34: How should Qwest, as the Local PIC, bill for intraLATA toll calls?

PRICING

Issue No. 35: Should rates in the agreement apply to services purchased from AT&T by Qwest?

The Commission will consider these arbitrated issues below.

I. THE ARBITRATORS' REPORT GENERALLY

Having reviewed the full record of this proceeding and provided an opportunity for all parties to be heard, the Commission generally finds the reasoning of the Arbitrator's Report persuasive. No party has taken exception to the ALJs' recommendations with respect to Issues Nos. 2, 23, 30, 33 or 35, and the Commission concurs with the ALJs' findings and conclusions. Consequently, the Commission will accept, adopt, and incorporate into this Order the ALJs' reasoning and conclusions with respect to these issues.

II. GENERAL TERMS

Issue No. 1: How should tariffed services be made available to AT&T? (ICA Section 1.9)

A. The Issue

Where Qwest offers a service in its tariffs, may AT&T buy that service without going through the "change process" proposed at section 1.8 of the ICA?

Qwest offers services both through tariffs and through ICAs. AT&T and Qwest agree that AT&T should be able to elect to receive services under the terms of a tariff or an ICA, and they propose to include the following language in the ICA:

> 1.9 If any time while the Agreement is in effect, Qwest provides, pursuant to the terms of any effective Tariff, services, Interconnection or Network Elements at rates, terms, or conditions different from those available under this Agreement, then CLEC may, at its discretion, substitute the Tariff's rates, terms and conditions in whole or in part, in place of the relevant rates, terms and conditions in this Agreement. CLEC may exercise this option by following the process set forth in Section 1.8 of this Agreement....

ICA Section 1.8 establishes a "change process" for adopting new terms into the ICA.

AT&T, the Department and Onvoy do not object to the use of Section 1.8 procedures to incorporate a tariff term into the ICA, but they regard the procedures as needlessly burdensome and time-consuming where a CLEC merely seeks to buy a service at tariffed rates without modifying its ICA. AT&T proposed the following additional language to clarify this point:

> Separate from such adoption, CLEC may choose to place orders from a Qwest Tariff. If CLEC does so, but does not choose to incorporate such Tariff terms into this Agreement, such orders shall be governed by the Tariff terms and conditions.

Qwest objected to this language, arguing that this procedure would not give Qwest adequate information to track whether AT&T was ordering a service from a tariff or from an ICA. In response to Qwest's concerns, AT&T proposed the following language as well:

> When ordering from a Qwest Tariff, if the ordering process used by CLEC and the information contained in the order are both the same as for orders placed under this Agreement, Qwest may not be able to recognize that the order is made under a Qwest Tariff. If Qwest is not able to recognize this distinction, CLEC and Qwest will mutually agree to a process by which CLEC orders placed under a Qwest Tariff can be distinguished by Qwest as being placed under a Qwest Tariff rather than under this Agreement.

Qwest offered a counter-proposal, requiring written notice that would remain in effect until cancelled.

B. The ALJs' Recommendation

Finding no agreement among the parties, the ALJs crafted new language designed to accommodate the parties' concerns and fulfill the 1996 Act's purposes, as set forth in the Arbitrators' Report. Generally, the ALJs recommend adding language directing Qwest to provide special codes to CLECs to identify orders from tariffs, and directing CLECs to use such codes.

Subsequently, Qwest dropped its objections to AT&T's proposed language.

C. Applicable Law

Where a telephone company offers the same service under both a tariff and an ICA, a CLEC has the legal discretion to order the service under whichever terms it finds most favorable.[21]

While the Commission has broad discretion to rule on arbitrated terms, the Commission is compelled to approve negotiated terms unless they discriminate against telecommunications carriers who are not party to the agreement, or unless they are inconsistent with the public interest, convenience and necessity.[22]

D. Commission Decision

While there may be merit in the ALJs' recommendation, the fact that AT&T and Qwest have reached agreement about this issue reduces the scope of the Commission's analysis. No party has alleged that the AT&T/Qwest language would discriminate against any other party, or that it conflicts with the public interest, convenience and necessity. Finding no such defects, the Commission must approve the language agreed to by AT&T and Qwest. The ALJs' recommended language will consequently be declined.

III. DEFINITIONS

Issue No. 3: How should a "Tandem Office Switch" be defined? (ICA Section 4.0)

A. The Issue

Should the compensation that Qwest pays AT&T for the use of AT&T's switch to transport and terminate Qwest's calls be calculated on the same rate that AT&T pays Qwest for the use of Qwest's tandem office switches? This question turns on the comparability of AT&T's switches to Qwest's tandem switches.

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[21] A telephone company may not withhold or otherwise unreasonably discriminate in the provision of tariffed services or services offered via interconnection agreements. Minn. Stat. §§ 237.07, subd. 2, 237.081, subd. 4, 237.09, subd. 1, 237.121(a)(5), 237.14, 237.60, subd. 3; 47 U.S.C. § 252(i).

[22] 47 U.S.C. § 252(e)(2).

To permit the customers of one telecommunications carrier to call the customers of another provider, the 1996 Act requires the carriers to interconnect their networks.[23] The 1996 Act further requires carriers to compensate each other for services rendered in the completion of calls on behalf of each others' customers,[24] including transport and termination. "Transport" refers to a carrier transmitting the calls of another carrier's customer.[25] "Termination" refers to a carrier routing and completing the calls made to its own subscribers by another carrier's customer.[26]

In Qwest's network, subscribers connect to Qwest's "end offices" though cables called "local loops." Qwest's end offices connect to tandem offices through cables called "trunks." Tandem offices connect to each other, permitting traffic to be routed from one subscriber on the network to any other. AT&T's network follows a different design. It does not have traditional tandem switches, but instead employs a smaller number of end-office switches, each one covering a much larger geographic area than the area covered by a typical end-office switch of Qwest. In essence, AT&T has decided to have fewer end-office switches and longer loops, believing this to be the more efficient approach.

Unless carriers agree to a "bill and keep" system whereby they waive their rights to bill each other, their ICA must specify the method for calculating how much to bill one another. Generally, a carrier's bill would be based on the amount of telephone traffic the carrier transported and terminated on behalf of another carrier, and on the incumbent's costs[27] of common transport, tandem transport, tandem switching, and end-office switching.

Tandem switching costs more than end-office switching, triggering greater compensation. Consequently, AT&T has an incentive to seek a broader definition of tandem office switch so as to ensure that more of its switches qualify for higher compensation; conversely, Qwest has an incentive to make the definition narrow.

Qwest argues that a switch should not be regarded as a tandem switch unless it "serves a comparable geographic area as Qwest's Tandem Office Switch." AT&T, the Department and Onvoy ask the Commission to reaffirm the decision it reached in a prior ICA arbitration and treat any switch that is capable of serving a comparable geographic area as Qwest's Tandem Office Switch as a tandem switch.[28]

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[23] 47 U.S.C. § 251(a)(1).

[24] 47 U.S.C. § 251(b)(5).

[25] 47 U.S.C. § 51.701(c).

[26] 47 U.S.C. § 51.701(d).

[27] Federal rules permit a CLEC to demand a higher rate of compensation if it can demonstrate that its costs, calculated on the basis of the forwarding-looking costs of an efficiently configured network, would be higher than the incumbent's. 47 C.F.R. § 51.711.

[28] *Consolidated Arbitration*, ORDER RESOLVING ARBITRATION ISSUES (December 2, 1996) at 71-72.

B. Applicable Law

Section 252(d)(2) of the 1996 Act requires interconnected competitors to pay just and reasonable rates in compensating one another for the cost of terminating and transporting one another's traffic.

In its *Local Competition First Report and Order*, the FCC stated:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. *Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate*.[29]

The FCC has addressed this issue at least twice more. In its *Intercarrier Compensation Notice of Proposed Rulemaking*, the FCC clarified that in order to receive the tandem rate of compensation, a CLEC need only demonstrate that its switch serves a geographic area comparable to that of the incumbent LEC; it need not establish that its switch provides all the same functions as the incumbent's tandem switch.[30]

In addition, the FCC rejected the argument that a CLEC must demonstrate that its switches are actually serving comparable geographic areas to the incumbent's tandem switch before the CLEC can obtain tandem compensation. In its *Verizon Arbitration Order*, the FCC found that "the requisite comparison under the tandem rate rule is whether the competitive LEC's switch is *capable of serving* a geographic area that is comparable to the architecture served by the incumbent LEC's tandem switch."[31]

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[29] *Local Competition First Report and Order* at ¶ 1090 (emphasis added); see also 47 C.F.R. § 51.711(a)(3).

[30] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rule Making, FCC Docket No. 01-92, 16 FCC Rcd 9610 (2001) at ¶ 105.

[31] *In the Matter of the Petition of AT&T Communications of Virginia, Inc., pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, Memorandum Opinion and Order, FCC Docket No. 00-251 (rel. July 17, 2002) (*Verizon Arbitration Order*) at ¶ 309 (emphasis added).

C. The ALJs' Recommendation

The ALJs recommend that the Commission define a tandem switch as a switch that "is (are) capable of serving a comparable geographic area as Qwest's Tandem Office Switch," as advocated by AT&T, the Department and Onvoy.

Qwest opposes this recommendation, noting that the FCC has repeatedly stated that CLECs are entitled to tandem switch compensation when a call passes through a CLEC's switch that *serves* a geographic area comparable to the area served by the incumbent LEC's tandem switch. Qwest argues that the *Verizon Arbitration Order* merely reflects the view of the FCC's Wireline Competition Bureau, not the view of the entire FCC. And Qwest argues that various other state commissions have rejected AT&T's "capable of serving" language.

While AT&T supports the ALJs' recommendation, it asks the Commission to go beyond merely adopting ICA language and to make a factual finding that AT&T's switches actually qualify as tandem switches.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. While Qwest's proposed language is derived directly from FCC language, it is evident that Qwest's interpretation of that language differs from the FCC's interpretation.

AT&T's "capable of serving" language reflects the FCC's most specific pronouncement on this issue, and is consistent the parties' past practice. It also reflects sounder public policy than Qwest's proposal. Qwest argues that the rate of compensation due a CLEC should depend on whether the CLEC's switch serves customers throughout a given area. By this standard, the chief determinant of compensation would not be a switch's capabilities or cost, but the extent to which a CLEC had attracted a geographically-dispersed group of customers.[32] The Commission finds little merit in awarding compensation on this basis. As the Commission observed in arbitrating the prior ICA between these parties,

> The Commission will ... direct the parties to charge symmetrical rates for termination and transport to the extent the relevant CLEC switch *has the capability of serving* the same geographic area as the incumbent's tandem.
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> * * *
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> If one carrier transports calls more economically than the other, the efficient carrier should not be penalized for its efficiency. The asymmetry proposed by [the incumbent] could result in a lower rate paid to the more efficient CLEC for precisely the same function. This would create the perverse incentive to duplicate the incumbent's less efficient network.
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[32] *Id.*

> The CLEC's current subscribership or extent of its fiber network, however, should not enter into the analysis. The geographic capability of the CLEC's switch provides the relevant basis for determining geographic comparability. What matters is whether the CLEC's switch can reach a comparable area, not whether the switch is currently wired to serve that entire area.[33]

Because AT&T's language articulates sound public policy in a less ambiguous way, it represents the better choice for inclusion in the ICA.

The Commission will decline to make a factual finding about the nature of AT&T's switches at this time. This docket exists for the purpose of resolving arbitrated terms for an ICA within a federally-mandated time frame; the Commission is disinclined to expand the docket's scope. If the parties cannot reach agreement about how the Commission-approved definition applies in any given context, they may pursue the conflict-resolution mechanisms available in the ICA.

Issue No. 5: How should "Extended Area Service/Local Traffic" be defined? (ICA Section 4.0)

A. The Issue

The definition of "EAS/Local Traffic" influences how customers and their carriers are billed for a call, implicating the payment of switched access fees and potentially other charges.

Local telephone carriers subject to Commission rules must offer subscribers the opportunity to make unlimited calls within a specified "local calling area" for a fixed monthly fee.[34] For example, if an AT&T customer living in Marshall, Minnesota calls a Qwest customer living in the same local calling area, the AT&T customer need not pay any incremental charges. AT&T would pay Qwest cost-based reciprocal compensation to terminate this local call. But if the Marshall customer called a Qwest customer in Rochester, Minnesota, the customer might incur a toll charge and AT&T would need to pay switched access fees to Qwest. Switched access fees need not be cost-based, and are typically higher than reciprocal compensation rates. Additionally, some intercarrier charges vary with the distance of the call. Consequently, the question of whether a call is characterized as local or toll, and the manner in which a call's distance is determined, have financial consequences.

The Department, MIC, OAG-RUD, Onvoy and Qwest recommend making these judgments on the basis of where a call originates and terminates. If a call originates and terminates within the same local calling area, then the call would be deemed a local call and no incremental charge would be incurred. In contrast, AT&T recommends making these judgments on the basis of the phone numbers from which the call originates and terminates.

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[33] *Consolidated Arbitration*, ORDER RESOLVING ARBITRATION ISSUES (December 2, 1996) at 71-72.

[34] Minn. Rules parts 7811.0600, subp 2; 7812.0600, subp 2.

AT&T's proposal warrants some explanation. The North American Numbering Plan provides for telephone numbers consisting of a three-digit area code (known as the "numbering plan area" or NPA), a three-digit "prefix" (denoted "NXX"), and a four-digit line number. NXX codes are assigned to particular central offices or rate centers, and are associated with specific geographic areas.

A rate center identifies the geographical center of an exchange or group of exchanges for purposes of determining the point from which to calculate the mileage used to determine the appropriate rate for a long-distance toll call. All calls from phone numbers having a given NPA-NXX code would be presumed to start from the same rate center; all calls to phone numbers having the same NPA-NXX code would be presumed to terminate at the same rate center. Consequently, if the calling party and the called party both have the same NPA-NXX code in their phone numbers, then the call would be presumed to start and end at the same point. Such a call would incur no distance charges, and be deemed a local call. For example, a call from 612-555-1234 could terminate at any 612-555 number without incurring distance charges.

Both Qwest's and AT&T's proposed methods of distinguishing local calls from toll calls and of estimating call distance generally produce the same results. This is because phone numbers with the same NPA-NXX codes generally are assigned to subscribers within the same local calling area.

But there are exceptions. A subscriber may request a phone number with a different NPA-NXX code than would normally be assigned given the subscriber's local calling area. For example, a subscriber living in Marshall, Minnesota could request a phone number with the Rochester NPA-NXX. Calls from the Marshall subscriber to other people in Marshall would be treated as toll calls despite the fact that the call would originate and terminate within the same local calling area. Conversely, calls between the Marshall subscriber and other people in Rochester would be treated as local calls, despite the fact that Marshall and Rochester are not in the same local calling area. In this manner, the Marshall subscriber could make calls to Rochester without incurring toll charges. Qwest calls this service Foreign Exchange (FX). AT&T offers a similar service called Virtual NXX (VNXX).

B. Applicable Law

The 1996 Act's § 251(g) states:

> Continued Enforcement of Exchange Access and Interconnection Requirements. —On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

Minnesota Rules part 7810.0100, subps. 14, 15, 22, and 23 define, respectively, “exchange," “exchange service area,” “local calling area,” and “local exchange service” as follows:

> "Exchange" means a unit established by a telephone utility for which a separate local rate schedule is provided. It may consist of one or more central offices together with associated plant facilities used in furnishing telecommunication services in that area.
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> "Exchange service area" means the *geographical* territory served by an exchange, usually embracing a city, town, or village and its environs. (Emphasis added).
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> "Local calling area" means the area within which telecommunication service is furnished customers under a specific schedule or exchange rates. A local calling area may include one or more exchange service areas or portions of exchange service areas.
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> "Local exchange service" means telecommunication service provided within local exchange service areas in accordance with the tariffs. It includes the use of exchange facilities required to establish connections between stations within the exchange and between stations and the toll facilities serving the exchange.

C. The ALJs’ Recommendation

The ALJs conclude that Qwest’s proposed language is more consistent with the Commission’s rules and poses fewer novel policy issues. While AT&T’s proposed language may reflect emerging marketing concepts based on developing technology, the ALJs conclude that AT&T’s language is not consistent with Commission rules. The ALJs do not find fault with AT&T’s proposal, but rather conclude that the proposal could have consequences for parties beyond the scope of this ICA. Consequently, the ALJs recommend adopting Qwest’s language until the consequences of AT&T’s proposal can be explored in a broader context.

AT&T denies that its proposed language is inconsistent with federal law, Commission rules or industry practice. AT&T acknowledges that the Commission defines “exchange service area” as a “geographical territory served by an exchange,” but AT&T notes that the Commission defines “exchange” as a geographic “unit established by a telephone utility....” Because AT&T is also a telephone utility,[35] AT&T argues that geographic units proposed by AT&T would also qualify as exchanges, permitting the rest of the Commission’s definitions to apply to AT&T’s proposed definition of local calling area.

Regardless of which language the Commission adopts, AT&T seeks assurances about how the language would apply to its VNXX service.

D. Commission Decision

The Commission finds the ALJs’ reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. This position is also supported by the Department, MIC, OAG-RUD, Onvoy and Qwest.

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[35] Minn. Rules part 7810.0100, subp. 37.

The Commission has traditionally understood the concept of a "local call" as a call that originates and terminates within the same local calling area. While AT&T's proposal may have its own merits, the Commission is concerned by party suggestions that the proposal would impinge upon the operations of other carriers,[36] affect the application of reciprocal compensation and access charges,[37] and have unexplored consequences for enhanced 911 service routing, numbering resource conservation and local number portability.[38]

AT&T has two main criticisms of the language recommended by the ALJs. First, AT&T disparages the practice of building future-looking telecommunications regulation on a foundation of existing local calling area boundaries. AT&T characterizes these boundaries as an arbitrary artifact of a monopoly era network structures as they evolved over time. But, for better or worse, this criticism applies to many aspects of telephone regulation. For example, while the FCC directs states to establish UNE prices on the basis of an efficient forward-looking network, the FCC makes a concession to the legacy of existing network structures when it directs states to model these networks around existing wire centers.[39] Indeed, the entire 1996 Act is built upon the historical distinctions between regional Bell Operating Companies (RBOCs), other incumbent companies, and new entrants[40] -- reflecting Congress' judgment that it is appropriate to build on the past when designing the future.

Moreover, local calling area boundaries are not entirely arbitrary. Admittedly, the boundaries derived from the exchange boundaries that emerged through the build-out of telephone plant. But subscribers have the opportunity to change the boundaries of their local calling areas through the Extended Area Service process.[41] Consequently, today's local calling area boundaries are not merely the product of historical accident or the designs of the incumbent carriers; the boundaries reflect current consumer preferences.

AT&T's other criticism is that Qwest's proposed language might be construed to authorize Qwest to subject AT&T's VNXX service to access charges without subjecting its own FX service to similar charges. Although the record is unclear about whether Qwest has imposed access charges on its FX service, AT&T acknowledges that Qwest has not heretofore imposed access charges on AT&T's VNXX service. Thus, neither AT&T nor the Commission has a current basis for alleging discrimination. If in the future AT&T believes that Qwest is applying the terms of the ICA in an unequal fashion, AT&T may pursue the dispute resolution process contained in the agreement.

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[36] MIC Reply Brief at 5.

[37] Onvoy Comments.

[38] Department Brief at 19-20.

[39] 47 C.F.R. § 51.505(b)(1).

[40] 47 U.S.C. § 251.

[41] See generally *In the Matter of an Investigation into the Appropriate Calling Scope, in Accordance with Minn. Stat. § 237.161 (1994)*, Docket No. P-999/CI-94-296 ORDER AFTER RECONSIDERATION (February 23, 1996) and ERRATUM (February 28, 1996).

IV. TERMS AND CONDITIONS

Issue No. 8: What is the extent of each party's Limitation of Liability? (ICA Section 5.8.4)

A. The Issue

Should AT&T and Qwest be liable to each other for harm arising from their grossly negligent conduct?

When entering into a contract, commercial parties often seek to anticipate and limit the scope of their liabilities to one another. AT&T and Qwest include such limitations within their proposed ICA at section 5.8, listing the kinds of conduct for which they will accept liability, and the kinds of conduct for which they will not.

In this context, AT&T and Qwest agree that nothing in proposed ICA section 5.8.4 should limit either party's liability to the other for willful or intentional misconduct. But AT&T, the Department and Onvoy support expanding this language to preserve the parties' liability for their own grossly negligent conduct, as reflected in the following modification:

> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence)....

Qwest opposes this proposal.

B. Applicable Law

The Commission is authorized to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.[42]

In arbitrating the terms of AT&T's and Qwest's current ICA, the Commission concluded that –

> [c]ontracts typically and appropriately create exceptions to limitations of liability for intentional or grossly negligent acts. Such exceptions are considered good public policy, as they encourage management to deter such actions.[43]

C. The ALJs' Recommendation

The ALJs support AT&T's arguments. However, the ALJs recommend redrafting the language to omit the redundant phrase "willful or intentional," and to avoid any implication that negligent conduct is a type of willful misconduct. Their recommended language is as follows:

> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful ~~or intentional~~ misconduct or ~~(including~~ gross negligence~~)~~....

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[42] Minn. Stat. § 237.16, subd. 1(a).

[43] *Consolidated Arbitration*, ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT (March 17, 1997) at 60.

Qwest continues to oppose these references to gross negligence. Qwest argues that industry practice excludes liability for all but willful conduct, and that its Minnesota Statement of Generally Available Terms (SGAT) and even AT&T's own tariffs do not provide for liability for gross negligence. Qwest complains that gross negligence is ill-defined. Qwest minimizes the significance of the Commission's decision to adopt the gross negligence standard into the parties' current ICA, arguing that the issue was not fully explored at that time because it was not contested. Finally, Qwest notes that various states have rejected AT&T's proposal.

AT&T, the Department and Onvoy support preserving liability for grossly negligent conduct in the context of an ICA. If a Qwest employee installs equipment in a grossly negligent manner that results in harm to an AT&T employee or customer, AT&T argues that it should have the opportunity to obtain compensation from Qwest. AT&T argues that it should not have to prove that Qwest intentionally installed the equipment in a dangerous manner before AT&T could qualify for compensation. AT&T also notes various state decisions preserving Qwest's liability for grossly negligent conduct.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. The public policy discouraging negligent behavior, articulated by the Commission when adopting the current ICA, applies equally well today.

While the parties cite various cases to demonstrate how other states have addressed this issue, most of these discussions arose in the context of Qwest's compliance with the 1996 Act's § 271, not an ICA arbitration. Section 271 applications are subject to a more limited review than arbitration cases, which provide for the application of state policy as well as federal policy.[44] For purposes of arbitrating the terms of an ICA, therefore, it may be instructive to note when a state finds that an RBOC's proposal fails to meet even the deferential standards of § 271. But a finding that an RBOC's proposal does pass muster for purposes of § 271 is not strongly indicative of the proposal's merits for an arbitration.

Finally, the Commission is not persuaded that gross negligence is too vague a concept to incorporate into an ICA. While Qwest accurately notes that courts have offered varied characterizations of "gross negligence," this does not lead to the conclusion that the term is unreasonably vague. The ALJs observe that courts have also offered varied characterizations of terms such as "willful" and "intentional."[45] AT&T and Qwest have been living with the gross negligence clause as part of their current ICA since 1997, apparently without problem. The parties shall incorporate the gross negligence clause into their new ICA.

Issue No. 9: How should the agreement set forth Indemnity obligations? (ICA Sections 5.9.1.1, 5.9.1.2)

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[44] 47 U.S.C. § 252(c); *Local Competition First Report and Order* at ¶¶ 233, 244.

[45] Arbitrators' Report at ¶ 71.

A. The Issue

To "indemnify" means to compensate a victim for a loss.[46] The draft ICA's section 5.9.1 states the extent to which Qwest will indemnify AT&T for the consequences of Qwest's conduct, and vice versa.

Given the unpredictable and vast harm that might arise from interrupted utility service, utilities have traditionally limited their liability to their retail customers. Both AT&T and Qwest have relationships to their respective retail customers that provide a means for limiting their liabilities, whether through tariff or by contract. In addition to serving its own retail customers, Qwest provides wholesale elements and services that benefit the retail customers of CLECs such as AT&T. But Qwest has no relationship with a CLEC's retail customers that might provide a vehicle for limiting Qwest's liability to those customers. An ICA provides a means by which the party having a relationship with a retail customer (such as a CLEC) can contract to indemnify the party that lacks that relationship (such as an ILEC providing wholesale services and elements to the CLEC).

At draft section 5.9.1.2, AT&T and Qwest agree to assume responsibility for the claims of their own retail customers generally. AT&T argues, however, that no party should have to accept responsibility for the other's willful misconduct, intentional misconduct, negligence or gross negligence. Qwest agrees to make exceptions for 1) willful misconduct and 2) negligence and intentional misconduct directly resulting in physical bodily injury or harm to tangible property. But Qwest opposes making additional exceptions.

In addition, draft section 5.9.1.1 provides for Qwest to indemnify AT&T for certain kinds of losses arising from Qwest's failure to comply with the ICA, and vice versa. AT&T proposes expanding this subsection in various ways. AT&T proposes that the parties indemnify each other for liability arising from the other party's "performance, breach of Applicable Law, or status of its employees, agents and subcontractors," as well as actual or alleged infringement of intellectual property rights. While AT&T and Qwest agree to indemnify each other for "reasonable costs and expenses (including attorneys' fees)," AT&T proposes adding a reference to "accounting fees and other" as well. While they agree to indemnify each other for bodily injuries, AT&T seeks to expand this to include all personal injuries (including, for example, negligent infliction of emotional distress). While they agree to indemnify each other for loss or damage to tangible property, AT&T seeks to expand this to include all property. Qwest opposes all these proposals.

The Department regards AT&T's "personal injury" or "accounting fees and other" proposals as needless or worse. The Department regards most of AT&T's other proposals as acceptable in that they do not impermissibly expand the scope of the parties' obligations to each other.

B. Applicable Law

The Commission is authorized to prescribe the terms and conditions of service delivery for the purpose of bringing about fair and reasonable competition for local exchange telephone services.[47]

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[46] *Black's Law Dictionary* (6th ed.).

[47] Minn. Stat. § 237.16, subd. 1(a).

C. The ALJs' Recommendation

Similar to the ALJs' recommendation concerning Issue 8, the ALJs support AT&T's arguments regarding intentional misconduct and gross negligence, but recommend redrafting AT&T's language to omit the redundant phrase "willful or intentional" and to avoid any implication that negligent conduct is a type of willful misconduct. The ALJs also approve of the clarity provided by AT&T's language regarding indemnification for infringement of the intellectual property rights of third parties. But the ALJs recommend rejecting AT&T's other proposals regarding indemnification.

AT&T continues to advocate for broader indemnification on the general theory that parties should bear full responsibility for their own conduct. Qwest continues to oppose the changes recommended by the ALJs for the same reasons articulated in the discussion of Issue 8.

D. Commission Decision

As the ALJs observe, the apportionment of liability must balance various factors, including causation, business practice and customer relations.[48] These are not matters that lend themselves to one uniform basis for decision.

Generally, the Commission regards indemnity clauses as means for allocating foreseen risks, not as means to induce parties to insure one another against unanticipated and unbounded possibilities. Qwest expressed concern that AT&T could advertise that it would not limit liability for consequential damage for service interruptions, knowing that Qwest would make AT&T whole if a claim ever arose. Whether or not this is a likely scenario, the indemnity language should not be drafted in a fashion to enable such a result.

The interest of clarity favors certain outcomes over others. Language addressing how to treat liability from intellectual property violations adds clarity, and will be approved. Clarity favors the elimination of redundant terms, lest they suggest some unintended significance to the reader. In this vein, the Commission affirms the ALJs' recommendation to eliminate references to "willful or intentional conduct." Similarly, the parties are warranted in specifying whether they will indemnify each other for attorneys' fees because the default assumption is that all parties bear their own attorneys fees. There is no similar presumption regarding accounting fees.

The Commission will decline to expand the indemnity clause to cover a party's "performance, breach of Applicable Law, or status of its employees, agents and subcontractors...." This language would make parties potentially liable for another party's conduct far removed from the ICA.

In sum, the Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

V. INTERCONNECTION

Issue No. 14: How should the parties terminate EAS/Local traffic? (ICA Section 7.2.2.9.6)

[48] Arbitrators' Report at 97.

A. The Issue

As noted above, the 1996 Act requires all telephone carriers to interconnect their networks to permit the customers of one telecommunications carrier to call the customers of another carrier.[49] Qwest's network has a number of end-office switches connected to subscribers, and a smaller number of tandem switches which connect multiple end-office switches to one another and to other tandems using cables called "trunks." Conceptually, tandem switches are closer to the center of the network "web," with lines radiating out to the end-office switches, which in turn have lines radiating out to retail customers.

This network's operations can be influenced by where a CLEC connects to the network. To minimize the number of points of interconnection, and their associated costs, a CLEC may prefer to interconnect with one of Qwest's tandem office switches to facilitate distribution of the CLEC's calls over the broadest area. But such an arrangement would require the consumption of tandem switch resources for every call; switches can only transfer a finite amount of information within any given period. In contrast, if a CLEC connects to Qwest's network at a place closer to where its traffic will terminate – at an end office, for example – then the CLEC's traffic would consume less of Qwest's system resources. To ensure the same coverage area as the tandem interconnection provides, however, the CLEC might need to obtain multiple points of interconnection, increasing its interconnection costs.

Where AT&T achieves some threshold level of traffic to a given end-office switch, Qwest seeks the opportunity to propose that AT&T establish a direct trunk line to that switch rather than routing all the traffic through Qwest's tandem office switch first. AT&T argues that Qwest's proposal infringes on its discretion to select its point of interconnection with Qwest's network. The Department and Onvoy agree that CLECs have broad discretion to select where they interconnect with Qwest's network.

B. Applicable Law

Qwest must allow interconnection by a CLEC at any technically feasible point.[50] In its *Local Competition First Report and Order*, the FCC explained:

> The interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic.[51]

Reconciling CLECs' discretion with concerns for network efficiency, AT&T's and Qwest's current ICA provides that the parties –

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[49] 47 U.S.C. § 251(a)(1).

[50] 47 C.F.R. § 51.305(a)(2).

[51] *Local Competition First Report and Order* at ¶ 172.

shall install and retain direct end office trunking sufficient to handle actually or reasonably forecasted traffic volumes, whichever is greater, between an AT&T switching center and a [Qwest] end office where the local traffic exceeds or is forecasted to exceed 512 CCS at the busy hour.

C. The ALJs' Recommendation

The ALJs recommend adopting language that would permit Qwest to ask AT&T to establish direct trunks to Qwest's end-office switches whenever AT&T's traffic to that end-office exceeds the threshold established in the current ICA. AT&T could decline to order such a trunk if doing so would "impose upon it a material adverse economic or operations impact."

AT&T and the Department object that this language would place on AT&T the burden of demonstrating material adverse economic or operations impact.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. Their recommendation represents a reasonable accommodation of the desire of all parties that wholesale operations be conducted in an efficient manner, and it is less onerous than the language in the current ICA.

Issue Nos. 15 and 16: Should the rate for Private Line Transport Service include a relative use factor? (ICA Sections 7.3.1.1.2)

A. The Issue

As noted above, the 1996 Act requires all telephone carriers to interconnect their networks to permit the customers of one telecommunications carrier to call the customers of another carrier.[52] Interconnection requires some type of facility – typically a fiber-optic trunk cable – for sending calls between the two networks. Qwest makes dedicated trunking facilities available under a variety of terms, all capable of providing interconnection to a CLEC's network. Whether the trunks are sold as a "dedicated two-way entrance facility" based on forward-looking costs, or as a "private line facility" sold at tariffed rates, these facilities require similar plant and perform similar interconnecting functions.

Yet Qwest argues that the costs for these two facilities should be apportioned differently. Where the CLEC orders a dedicated two-way entrance facility, Qwest generally agrees to share in the cost of the facility in proportion to the amount of traffic Qwest sends across it. But Qwest declines to bear any share of private line facility costs. AT&T and the Department object to Qwest's refusal to contribute to the cost of private line facilities that Qwest uses to exchange traffic with AT&T.

B. Applicable Law

Generally parties must share the cost of flat-rated interconnection facilities:

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[52] 47 U.S.C. § 251(a)(1).

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[53]

In its *Local Competition First Report and Order*, the FCC apparently contemplated this situation when it said:

> The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the inter-connecting carrier uses exclusively for sending terminating traffic to the providing carrier, then the inter-connecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The inter-connecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the inter-connecting carrier. Under an alternative scenario, *if the providing carrier provides two-way trunks between its network and the inter-connecting carrier's network, then the inter-connecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the inter-connecting carrier, as well as by the inter-connecting carrier to send terminating traffic to the providing carrier. Rather, the inter-connecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the inter-connecting carrier uses to send terminating traffic to the providing carrier*.[54]

Finally, the FCC has concluded that under federal rules on reciprocal compensation, "to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic."[55]

C. The ALJs' Recommendation

The ALJs recommend adopting language supported by AT&T and the Department that would have Qwest bear its proportionate share of the cost of a private line used for exchanging local traffic (including EAS).

Qwest takes exception to this recommendation. Qwest notes that AT&T uses private line facilities to transfer local traffic as well as for other purposes such as transferring long-distance traffic. Qwest argues that these other purposes are the reason that AT&T uses private lines rather than the relatively inexpensive dedicated entrance facilities. According to Qwest, AT&T would lease these

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[53] 47 C.F.R. § 51.709(b).

[54] *Local Competition First Report and Order* at ¶ 1062 (emphasis added).

[55] *Verizon Arbitration Order* at ¶ 52.

private lines even in the absence of the need to transport local traffic, and that AT&T uses these facilities for local traffic only because they have excess capacity that otherwise would simply go unused. In essence, Qwest argues that this excess capacity is a byproduct of AT&T's other business, which AT&T has chosen to apply at no incremental cost to its local business.

Qwest does not object to AT&T using these more expensive facilities for the purpose of exchanging local traffic, but Qwest does object to having to share in the facilities' cost. Because AT&T is using excess capacity, Qwest argues that its traffic imposes no incremental cost on AT&T and therefore Qwest should pay nothing. Also, Qwest notes that tariffed rates are not necessarily cost-based, and that Qwest should not be compelled to contribute toward offsetting AT&T's non-cost-based costs. Qwest notes that the ALJ in its § 271 case supported this view. And Qwest argues that its tariff precludes the sharing of private line costs.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

The Commission is not persuaded by Qwest's incremental cost arguments. As AT&T, the Department and the ALJs note, Qwest's use of the private line's capacity reduces the capacity available for AT&T. If that capacity ever becomes exhausted, AT&T will need to incur added costs to replace it.

While Qwest's private line rates are not necessarily based on forward-looking costs, the ALJ notes that the sharing proposal is based on AT&T's actual costs – that is, Qwest's tariffed rate. Finally, Qwest's reliance on the filed tariff doctrine is misplaced, for various reasons. First, Qwest's tariff governs the terms under which Qwest permits AT&T to use a private line. As AT&T fulfills those terms, control over the private line is transferred to AT&T. Thus there is no dispute about the terms under which Qwest permits AT&T to use its private lines; the dispute concerns the terms under which *AT&T* will permit *Qwest* to use *its* private lines – the lines AT&T has leased from Qwest. This is not a matter that Qwest's tariffs govern, or even could govern.

Secondly, while Qwest accurately notes the binding legal effect of tariffs, it neglects to acknowledge the more binding legal effect of FCC decisions. The FCC's *Local Competition First Report and Order* and its *Verizon Arbitration Order* declare that an incumbent LEC bears financial responsibility for terminating its own traffic subject to reciprocal compensation, and that financial responsibility means sharing the costs in proportion to usage. Consistent with these pronouncements, the Commission will direct the parties to share the cost of fixed-price facilities used for the two-way exchange of local traffic, including private line facilities.

Issue No. 17: Should (and if so, how should) costs for two-way trunking be shared? (ICA Sections 7.3.1.1.3.1, 7.3.2.2.1)

A. The Issue

Having affirmed the merits of allocating interconnection facilities costs in proportion to their relative use, how should this policy apply to Internet-related traffic? Because people call their Internet service provider (ISP) vastly more often than their ISP calls them, the resulting traffic is virtually all in the direction of the ISP. If the cost of the trunk is allocated in proportion to the amount of traffic originated, the costs of the interconnection facility will be allocated heavily to the party not serving the ISP.

B. Applicable Law

Generally, the law provides that each party is responsible for carrying traffic that originates on its network to the point of interconnection with the other party's network:

> A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that *originates* on the LEC's network.[56]

The FCC has determined that this general principle is applicable to both reciprocal compensation and interconnection facilities used to deliver LEC-originated traffic.[57]

In addition, 47 C.F.R. § 51.709(b) provides that:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.

According to the FCC's *ISP Remand Order*, ISP-bound traffic is deemed to be "information access" rather than telecommunications traffic, and is therefore not subject to reciprocal compensation under § 251(b)(5).[58] But the FCC has not yet addressed the issue of how ISP-bound traffic should be treated in apportioning the costs of interconnection facilities.[59] In the *Level 3 Arbitration*,[60] the Minnesota Commission determined that ISP-bound traffic should be included in

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[56] 47 C.F.R. § 51.703(b) (emphasis added).

[57] *In the Matter of TSR Wireless, LLC v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd at 1116 (June 21, 2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C.Cir. 2001).

[58] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 & 99-68, Order on Remand and Report and Order, FCC-01-131 at ¶¶ 33-34 (rel. Apr. 27, 2001), *remanded sub nom., WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*ISP Remand Order*").

[59] *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, Memorandum Opinion and Order, FCC No. 02-332, 17 FCC Rcd 26303 at at ¶ 324 (2002) ("*Qwest Nine-State Order*").

[60] *In the Matter of the Petition of Level 3 Communications, LLC, for Arbitration to Resolve Issues Related to an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b),* Docket No. P-5733, 421/IC-02-1372 ORDER ACCEPTING ARBITRATOR's RECOMMENDATION AND REQUIRING FILED INTERCONNECTION AGREEMENT (December 6, 2002).

the formula used to allocate the costs of interconnection facilities. Public utility commissions in New Mexico and Washington have reached similar conclusions.[61]

C. The ALJs' Recommendation

The ALJs recommend adopting language supported by AT&T and the Department that would retain the policy articulated in the *Level 3 Arbitration*.

Qwest opposes this recommendation. Qwest argues that it is possible to reconcile statutes and rules with the conclusion that parties may ignore ISP-bound traffic for purposes of allocating the cost of the interconnection facilities, and that there may be policy reasons for doing so. And Qwest argues that the issue before the Commission is not the same as the issue addressed in the *Level 3 Arbitration*, given AT&T's efforts to alter the definition of "local calling area" (Issue No. 5).

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. Because the Commission has declined to adopt AT&T's recommended changes to the definition of "local calling area," the current issue is no different than the issue addressed by the Commission in the *Level 3 Arbitration*. The FCC's rules requiring parties to allocate facilities costs in proportion to usage does not make any exceptions for information access in general or ISP-bound traffic in particular. These rules control the issue.

Issue No. 19: How should the parties calculate the ratio of terminating to originating traffic? (ICA Sections 7.3.6.2.1)

A. The Issue

As noted above, ISP-bound traffic is not subject to the standard reciprocal compensation rules.[62] But how can the parties distinguish ISP-bound traffic from other traffic? As a practical remedy AT&T and Qwest agree to use an FCC presumption: For any given account, if the amount of terminating traffic is more than three times the amount of originating traffic, then a rebuttable presumption arises that the traffic is ISP-bound.

However, AT&T and Qwest do not agree about whether to include the minutes of usages for unbundled network element platforms (UNE-P) when applying the 3:1 ratio. AT&T and the Department support including the minutes; Qwest opposes it.

B. Applicable Law

In the *ISP Remand Order,* the FCC provided a method by which the parties may compensate each other for the transport and termination of ISP-bound traffic, at least on an interim basis, in lieu of using the reciprocal compensation rules. The FCC further stated:

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[61] Arbitrator's Report ¶ 126.

[62] *ISP Remand Order* ¶ 79.

> We understand that some carriers are unable to identify ISP-bound traffic. In order to limit disputes and avoid costly efforts to identify this traffic, we adopt a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in this Order. Using a rebuttable presumption in this context is consistent with the approach that numerous states have adopted to identify ISP-bound traffic or "convergent" traffic (including ISP traffic) that is subject to a lower reciprocal compensation rate. A carrier may rebut the presumption, for example, by demonstrating to the appropriate state commission that traffic above the 3:1 ratio is in fact local traffic delivered to non-ISP customers. In that case, the state commission will order payment of the state-approved or state-arbitrated reciprocal compensation rates for that traffic. Conversely, if a carrier can demonstrate to the state commission that traffic it delivers to another carrier is ISP-bound traffic, even though it does not exceed the 3:1 ratio, the state commission will relieve the originating carrier of reciprocal compensation payments for that traffic, which is subject instead to the compensation regime set forth in this Order. During the pendency of any such proceedings, LECs remain obligated to pay the presumptive rates ... subject to true-up upon the conclusion of state commission proceedings.[63]

In the *Verizon Arbitration Order,* the FCC addressed the specific issue raised here and determined that UNE-P minutes should be included in the ratio because the rebuttable presumption described in the *ISP Remand Order* does not distinguish between UNE-P traffic and originating interconnection trunk traffic.[64]

C. The ALJs' Recommendation

The ALJs recommend including the minutes of use for UNE-P when calculating the 3:1 ratio, consistent with the views of AT&T, the Department and the *Verizon Arbitration Order*.

Qwest opposes this recommendation, arguing that including UNE-P traffic when calculating the ratio would distort the formula because not all UNE-P traffic is appropriately considered local traffic. Qwest argues that the *Verizon Arbitration Order* should not be taken as a guide for resolving this issue. Qwest notes that it intends to develop a mechanized means for distinguishing ISP-bound traffic from other traffic. Finally, Qwest suggests that the Commission's decision to eliminate an incremental end-office termination rate renders this issue moot; AT&T disputes this claim.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. AT&T and Qwest have agreed to abide by the 3:1 ratio presumption articulated by the FCC. Given this fact, the Commission finds that the FCC's own application of that policy as demonstrated in the *Verizon Arbitration Order* to be the most persuasive authority for how this presumption should be applied.

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[63] *Id.*

[64] *Verizon Arbitration Order* ¶ 267.

While the Commission will rule against Qwest's position on this issue, the Commission offers no opinion about Qwest's proposal to develop the means for distinguishing between ISP-bound traffic and other traffic. The option to rebut the 3:1 ratio presumption will be available to either party.

Finally, by ruling on the merits of this issue, the Commission has rendered moot the question of whether this issue is moot.

Issue No. 21: How should calls be billed where no Customer Party Number is passed on? (ICA Sections 7.3.8)

A. The Issue

When using a Signaling System 7 network such as Qwest employs, calls are supposed to be transmitted along with data identifying the caller's phone number. This data is called Calling Party Number (CPN). CPN is used for Caller ID purposes; it is also used to determine whether the call should be deemed local (requiring the originating carrier to pay cost-based reciprocal compensation) or toll (requiring the originating carrier to pay switched access charges, which tend to be higher than reciprocal compensation rates). But for reasons beyond the parties' control, not all calls get transmitted with CPN.

AT&T and Qwest disagree on 1) how often to tolerate receiving calls lacking CPNs, and 2) how to compensate each other for these calls, given that the calls lack the data upon which compensation is typically determined. Qwest and the Department propose that the parties demand that 95% of traffic contain CPN; AT&T proposes a 90% threshold. Qwest proposes that CPN-less calls be treated as toll calls; AT&T and the Department propose treating the calls on a prorated basis, based on the proportion of local and toll calls that have CPNs.

B. Applicable Law

In the *Verizon Arbitration Order,* Verizon and WorldCom agreed to be content if at least 90% of calls contain CPN. But they disagreed about compensation: WorldCom proposed that the parties treat the calls lacking CPN on a prorated basis. Verizon advocated imposing access charges on all calls lacking CPN, noting that WorldCom's proposal would give CLECs a financial incentive to delete the CPN from toll calls. The FCC decided as follows:

> We adopt WorldCom's proposal because it offers a reasonable solution to address those situations in which the parties are unable to pass CPN on 90% of their exchanged traffic. Other than indicating concern about unnamed competitive LECs "stripping off" CPN to receive reciprocal compensation for a call subject to access charges, Verizon offers no real criticism of WorldCom's proposal. However sympathetic we may be to Verizon's concerns, we note that less drastic measures are available to it (*i.e.*, filing a complaint with the Virginia Commission.) We decline to burden WorldCom merely because of the potential for unlawful behavior by other competitive LECs.[65]

[65] *Verizon Arbitration Order* at ¶ 190.

C. The ALJs' Recommendation

The ALJs recommend allocating the CPN-less calls on a pro-rated basis, as recommended by AT&T and the Department. The ALJs also recommend adopting a 95% threshold for CPN traffic, as recommended by the Department and Qwest. AT&T and Qwest each take exception to aspects of these recommendations.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order. Qwest acknowledges that there are innocent circumstances wherein local traffic will be transmitted without CPN; therefore, treating all CPN-less calls as toll calls would be inaccurate and punitive. Proration is the more appropriate remedy.

Also, given that AT&T acknowledges 98.8% of its current traffic includes CPNs, the Commission finds a 95% threshold provides an appropriate balance between demanding high performance and leaving an adequate margin for error.

VI. COLLOCATION

Issue No. 22: How should Qwest handle equipment or property abandoned by AT&T? (ICA Sections 8.2.1.31)

A. The Issue

How should Qwest treat CLEC equipment that Qwest believes to have been abandoned on Qwest's premises? AT&T and Qwest each propose a process for addressing this question.

B. Applicable Law

As noted above, the 1996 Act requires all telephone carriers to interconnect their networks to permit the customers of one telecommunications carrier to call the customers of another carrier.[66] One means of interconnection is to permit a CLEC to locate its equipment within the ILEC's offices adjoining the ILEC's own switches.

Also as previously noted, the Commission has the authority to prescribe the terms and conditions of service delivery for the purpose of bringing about fair and reasonable competition for local exchange telephone service.[67]

C. The ALJs' Recommendation

The ALJs recommend adopting a method for addressing potentially-abandoned equipment on Qwest's premises, as supported by the Department and Qwest.

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[66] 47 U.S.C. § 251(a)(1).

[67] Minn. Stat. § 237.16, subd. 1(a).

AT&T objects to this procedure because it expressly gives Qwest sole discretion. AT&T asks that the language be amended to require Qwest to refrain from exercising its discretion in a discriminatory fashion. AT&T also advocates for a longer process. While AT&T initially proposed a 60-day period before Qwest could remove abandoned equipment, AT&T now seeks a three-month waiting period before Qwest could even ask whether some piece of equipment had been abandoned, as well as another 30 days for reply.

D. Commission Decision

In contrast to AT&T's proposal, the ALJs recommend that Qwest have sole discretion to ask a CLEC if its equipment has been abandoned; if the CLEC does not respond within 30 days, Qwest could remove the equipment. This is entirely adequate. AT&T's proposed procedure would be more burdensome than Qwest's but would not produce appreciably greater benefit. Because all parties benefit from an efficient administration of Qwest's wholesale operations, the Commission will approve Qwest's less bureaucratic approach to dealing with the issue of abandoned property.

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

VII. UNBUNDLED NETWORK ELEMENTS

Issue No. 24: What is Qwest's obligation to construct UNE facilities for AT&T? (ICA Sections 9.19 and 19.2)

A. The Issue

Occasionally a CLEC seeks a UNE from Qwest which Qwest does not have, either because Qwest had not built such a UNE or all such UNEs are already in use. Under some circumstances, Qwest's status as a "provider of last resort" or as an eligible telecommunications carrier[68] may compel Qwest to build a UNE to serve the customer.[69] But where these obligations do not apply, what discretion does Qwest have in deciding whether or not to build a new UNE to serve the customer?

Specifically, if Qwest would be willing to build a UNE to serve its own retail customer, must Qwest be willing to build the UNE to enable a CLEC to serve a customer under "substantially similar circumstances"? AT&T and the Department support such a policy; Qwest opposes it.

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[68] An eligible telecommunications carrier (ETC) must offer certain minimal telecommunications services within its designated area, advertise that it does so, and continue to offer and advertise these services until the Commission relieves it of its ETC duties. 47 U.S.C. § 214(e). As an incumbent LEC, Qwest is an ETC. Minn. Rules part 7812.1400, subp. 1.

[69] At draft ICA Section 9.1.2.1, AT&T and Qwest agree that –

> If facilities are not available, Qwest will build facilities dedicated to an End Use Customer if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier (ETC) obligation to provide primary basic Local Exchange Service.

B. Applicable Law

The Minnesota Legislature has determined that –

> A telephone company that offers or provides a service or services, service elements, features, or functionalities on a separate, stand-alone basis to any customer shall provide that service, service element, feature, or functionality pursuant to tariff to all similarly situated persons, including all telecommunications carriers and competitors. To the extent prohibited by the Federal Communications Commission or public utilities commission, a telephone company shall not give preference or discriminate in providing services, products, or facilities to an affiliate or to its own or an affiliate's retail department that sells to consumers.[70]

The 1996 Act's § 251(c)(3) requires an incumbent LEC to offer CLECs "nondiscriminatory access to network elements on an unbundled basis ... on rates, terms, and conditions that are just, reasonable, and nondiscriminatory...." The FCC construes this language to mean that –

> Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.[71]

But a LEC's obligations to provide UNEs for the benefit of CLECs is not open-ended. The 8th Circuit Court of Appeals has stated that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one."[72] On remand from that decision, the FCC stated that "we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[73]

C. The ALJs' Recommendation

The ALJs recommend adopting Qwest's language, putatively limiting Qwest's obligations to build UNEs on behalf of CLECs. The ALJs base their recommendation on three factors.

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[70] Minn. Stat. § 237.09, subd. 2(a).

[71] 47 C.F.R. § 51.313(b).

[72] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

[73] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 15 FCC Rcd 3696 (November 5, 1999) at ¶ 324.

First, the ALJs read the 8th Circuit's decision, and the FCC's decision on remand, to say that Qwest's obligation to offer UNEs only applies to its existing network. If AT&T seeks to have Qwest build new plant for the purpose of providing UNEs to AT&T, the ALJs conclude, then AT&T is asking for something Qwest has no obligation to provide.

Second, the ALJs dispute AT&T's claim that its proposed language tracks the language approved by the Commission in Qwest's wholesale service quality plan for Minnesota (MN WHSQ Plan).[74]

Third, the ALJs conclude that Qwest's proposed language was approved in the § 271 proceedings for inclusion in its statement of generally available terms (SGAT).[75]

D. Commission Decision

1. ALJs' Recommendation

The Commission reaches different conclusions regarding the factors that informed the ALJs' recommendation. Consequently, the Commission finds the ALJs' conclusion unpersuasive.

a. Eighth Circuit Decision

The ALJs cite the 8th Circuit's statement that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network--not to a yet unbuilt superior one" to support their recommendation to find that Qwest need not build new facilities for the benefit of CLECs. But this interpretation fails to reflect the context of that case. The 8th Circuit wrote those words while striking down rules giving CLECs the discretion to demand UNEs of superior quality. The Court concluded that where an incumbent LEC provides access to its UNEs on a nondiscriminatory basis, the requirements of § 251(c)(3) are fulfilled. The FCC had not adopted rules addressing circumstances where a LEC lacks a UNE with which to provide access; consequently, the 8th Circuit never had the opportunity to rule on that question.

The FCC's interpretation of the 8th Circuit's decision is instructive. The ALJs accurately quote the FCC on remand as saying that "we do not require incumbent LECs to construct new *transport* facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[76] But if the 8th Circuit had actually relieved LECs of the obligation to build any new UNEs for CLECs, then the FCC would have no need to

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[74] *In the Matter of Qwest's Wholesale Service Quality Standards*, Docket No. P-421/AM-00-849, Minnesota Wholesale Service Quality Plan (July 22, 2003).

[75] *In the Matter of Qwest Corporation Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. P-421/AM-01-1374; *In the Matter of Commission Investigation Into Qwest's Compliance with Sec. 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 1,2,4,5,6,11, 13 and 14*, Docket No. P-421/CI-01-1371 Findings of Fact, Conclusions of Law and Recommendations (January 28, 2003) ¶¶ 80-82.

[76] *UNE Remand Order* at ¶ 324 (emphasis added).

specify that LECs need not build new *transport* facilities in particular. Further analysis reveals that the FCC's decision to refrain from requiring LECs to build transport facilities was not based on the 8th Circuit decision; it was based on a concern for costs, as explained in a prior order where this policy was first articulated.[77]

Consequently, the Commission does not read the 8th Circuit decision, or the FCC's decision on remand, to determine the full extent of a LEC's obligations to build facilities for the benefit of its wholesale customers.

b. Minnesota Wholesale Service Quality Order

The MN WHSQ Plan sets forth standards for evaluating Qwest's provision of interconnection, UNEs, and wholesale and ancillary services to CLECs, and requires Qwest to make payments for failing to meet these standards. It states in relevant part as follows:

> OP-3 MEASUREMENTS – FACILITIES AVAILABILITY
>
> A. No Facilities – Existing Locations. In calculating remedy payments under OP-3 measures, an order for facilities shall be considered a miss if it is not completed by the due date or is rejected based on the "unavailability of facilities," unless the order is for facilities to a customer location that has not been previously served on a retail or wholesale basis with Qwest facilities.
>
> B. No Facilities – New Locations. An order for facilities to a customer location that has not been previously served with Qwest facilities, and for which Qwest declares no facilities available, shall not be rejected but shall be placed in "project status" and have a due date determined mutually by Qwest and the CLEC. Qwest must offer a due date no later than the expected availability date for installation for Qwest's own retail customers at the location in question.[78]

The Arbrator's Report discusses this language as follows:

> The Department also contends that AT&T's language should be adopted because similar provisions are contained in the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), adopted by the Minnesota Commission in its *MN WHSQ Order*. The MN WHSQ Plan specifically states that, for the purposes of determining OP-3, Installation Commitments Met, and its attendant remedies, Qwest will meet the OP-3 installation intervals when no facilities are available, "unless the order is for facilities

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[77] "In the Local Competition First Report and Order, the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use." *Id.*, citing *Local Competition First Report and Order,* 11 FCC Rcd at 15722, ¶ 451.

[78] *In the Matter of Qwest's Wholesale Service Quality Standards*, Docket No. P-421/AM-00-849, Minnesota Wholesale Service Quality Plan (July 22, 2003) at 49-50.

> to a customer location that has not been previously served on a retail or wholesale basis with Qwest facilities." When a customer location has not been previously served by Qwest facilities, if no facilities are available Qwest may place the order in "project status" and offer a due date "no later than the expected availability date for installation for Qwest's own retail customers at the location in question." This is different than the AT&T language, because the MN WHSQ Plan provisions require Qwest to offer a due date when it expects to build for its own customers "at the location in question." At that point, it would be discriminatory to refuse to provide facilities to a competitor. The AT&T language is not limited in this way, however, and would require Qwest to construct new facilities if it "would construct facilities for itself or an end user customer under the same or substantially similar circumstances." The AT&T language would also subject Qwest to penalties if it failed to complete orders for service related to such construction "within the applicable service interval" once construction is completed.[79]

The ALJs correctly distinguish AT&T's proposed ICA language from the language in the MN WHSQ Plan language.

That being said, AT&T and the Department correctly cite the MN WHSQ Plan to show that this Commission has not granted Qwest unbridled discretion over whether to build facilities to fulfill a CLEC's UNE order. The Plan provides for Qwest to make payments if Qwest fails to provide UNEs on a timely basis, even if all facilities to serve a specified location are being used. Even where Qwest has no facilities to a location, Qwest may not plan to build new facilities for the benefit of its own retail customers more quickly than it builds facilities for a CLEC's customer. In this manner, AT&T's and the Department's arguments are relevant to, although not determinative of, the issue of Qwest's obligation to build UNEs for CLECs.

c. Section 271 Proceeding

Finally, the ALJs' statement that "Qwest's language ... was recently approved in the 271 proceedings" is unpersuasive.

Under the 1996 Act's § 271, an RBOC such as Qwest may not compete in the interLATA long-distance market[80] until it demonstrates to the satisfaction of the FCC that the RBOC has opened its local market to competition. To bolster its claim to be facilitating competition in its local market, an RBOC may adopt a "statement of generally available terms" (SGAT). An SGAT sets forth the

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[79] Arbitrator's Report ¶ 168 (citations omitted).

[80] The term "LATA" comes from the break-up of American Telephone & Telegraph Co. (A.T.& T.). In 1982 A.T.& T. agreed to settle an antitrust suit by divesting its local telephone business to form the RBOCs, while continuing to provide long-distance service. To implement this change, the settlement defined 196 geographic areas called "local access and transport areas" (LATAs). An RBOC was prohibited from completing a call that crosses LATA boundaries. *United States v. Western Electric*, 552 F.Supp. 131 (D.D.C. 1982), affirmed sub nom. *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 472 (1983). The 1996 Act retains the LATA concept for purposes of defining the limits on an RBOC's provision of long-distance service. 47 U.S.C. §§ 151(25), 271.

terms, conditions and pricing under which an incumbent offers to provide interconnection, access to UNEs, and wholesale and ancillary services available to any CLEC without further negotiation.[81]

As the Commission has previously noted, the fact that a proposal is adequate for demonstrating compliance with § 271 does not indicate that a proposal is appropriate for arbitration purposes. Moreover, while the ALJ in the § 271 proceeding recommended finding that Qwest's SGAT language was adequate for demonstrating compliance with § 271, the Commission never adopted this recommendation. Finally, it must be noted that the SGAT is a document voluntarily drafted and proposed by Qwest. Its terms were never subject to arbitration, never approved by the Commission, and no party is bound by them except by choice. This is a very different circumstance from the current docket, where the terms of the proposed ICA are subject to compulsory negotiation and arbitration, and will bind both Qwest and AT&T. In this sense, the MN WHSQ Plan docket provides a more analogous proceeding than the § 271 proceeding to an arbitration. The ALJs acknowledge that Qwest's SGAT language is not determinative of how an issue should be resolved in an arbitration proceeding.[82]

2. Commission Action

Recognizing the difficulty of opening a monopoly-dominated network to competition, both Congress and the Minnesota Legislature emphasize the importance of ensuring that the incumbent accord equal treatment to new entrants as to its own retail operations.[83] Entrants may not be able to compete, and potential entrants may be discouraged from trying, if the monopoly wholesale provider were permitted to discriminate in favor of its own retail operations and against its competitors.

Qwest itself acknowledges the importance of avoiding discrimination in constructing facilities for CLECs. Qwest's proposed language at Section 19.2 says –

> All necessary construction will be undertaken at the discretion of Qwest, consistent with budgetary responsibilities, consideration for the impact on the general body of End User Customers[84] and *without discrimination among the various Carriers.*

(Emphasis added.) Qwest is a "Carrier."[85]

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[81] 47 U.S.C. § 252(f).

[82] Arbitrators' Report at ¶ 39, n.55.

[83] See, for example, 47 U.S.C. §§ 160(a)(1); 202(a); 222(c)(3); 224; 251; 252; 254; 271(b); 272(c); 276(a); Minn. Stat. §§ 237.07, subd. 2; 237.081, subd. 4; 237.09, subd. 1; 237.121(a)(5); 237.14; 237.60, subd. 3.

[84] An End User Customer is a retail customer. Draft ICA Section 4.0.

[85] "Carrier" is defined as a provider of telecommunications services, but excluding aggregators of telecommunications services. Draft ICA Section 4.0.

Because Qwest is the wholesale monopolist, the Commission finds it appropriate that Qwest would build facilities for a CLEC on the same basis that it would build one for its own retail operations. This policy is supported by AT&T and the Department, and has been adopted in many of Qwest's more populous states, including Arizona,[86] Colorado[87] and Washington.[88] It will now be adopted in Minnesota, too.

VIII. SERVICE PERFORMANCE

Issue No. 26: What wholesale service quality standards should the agreement include? (ICA Sections 20)

A. The Issue

Given the uncertain legal status of the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), how should the ICA incorporate the Plan?

B. Applicable Law

In separate dockets, the Commission has approved two schemes for gauging the quality of Qwest's wholesale services: the Performance Assurance Plan and the MN WHSQ Plan.

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[86] "Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself. Qwest shall treat CLEC orders the same as it would treat its own orders for new or additional service." Arizona SGAT, Section 9.19 (http://www.qwest.com/wholesale/downloads/2003/030909/Arizona-SGAT-8-29-03.doc); *In the Matter of U.S. WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Decision No. 64630 (March 15, 2002) at 11-13.

[87] Colorado SGAT, Section 9.19 (http://www.qwest.com/wholesale/downloads/2003/030314/Colorado-SGAT-3-4-03.doc); *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Docket No. 97I-198T, Volume 4A Impasse Issues Order (mailed August 16, 2001) at 7-10.

[88] Washington SGAT, Section 9.1.2.1 (http://www.qwest.com/wholesale/downloads/2002/020708/WA-SGAT-0062502.doc); *In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003040, Twenty-Fourth Supplemental Order (December 20, 2001) ¶¶ 10-19 (http://www.wutc.wa.gov/rms2.nsf/21690b9ff42c96cb88256b58006b5963/ef439dc4a164e2d908256b80000f7246!OpenDocument); Twenty-Eighth Supplemental Order (March 12, 2002) ¶¶ 17-22 (http://www.wutc.wa.gov/rms2.nsf/21690b9ff42c96cb88256b58006b5963/f153cbf8fef04d4908256b80000f5984!OpenDocument).

1. Performance Assurance Plans

As discussed above, the 1996 Act's § 271 prohibits an RBOC from competing in the long-distance market without the FCC's permission. To gain the FCC's permission the RBOC must demonstrate, among other things, that the RBOC permits competitors to interconnect with its system in a manner that fulfills the 14-point "competitive checklist" standards set forth at § 271(c)(2)(B), and that the RBOC's entry into the long-distance market would be "consistent with the public interest, convenience, and necessity."[89]

In making this public interest judgment, the FCC considers whether the RBOC provides "sufficient assurance that markets will remain open after grant of the application," and "whether an RBOC would continue to satisfy the requirements of section 271 after entering the long distance market."[90] The FCC has relied on post-entry "performance assurance plans" (PAPs) developed collaboratively by the RBOC, competitive carriers, and the states in finding that there are performance monitoring and enforcement mechanisms in place that would, "in combination with other factors, provide strong assurance that the local market will remain open after [the RBOC] receives section 271 authorization."[91]

In 2002 the Commission developed and approved a PAP for Qwest.[92] By its terms, a CLEC may incorporate the PAP into its ICA with Qwest. The PAP also states that a CLEC may adopt the MN WHSQ Plan in lieu of the PAP –

> (1) during the six months after the Commission has issued a final Order in its wholesale service quality docket, (2) upon mutual agreement between Qwest and the CLEC or (3) in response to a specific order by the Commission regarding the CLEC's election.[93]

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[89] 47 U.S.C. § 271(d)(3)(C).

[90] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4161-62 (1999) at ¶ 429, aff'd, 220 F.3d 607 (D.C. Cir. 2000).

[91] *Id.*

[92] *In the Matter of Qwest's Performance Assurance Plan*, Docket No. P-421/AM-01-1376 (*PAP Docket)*, ORDER ADOPTING PLAN AND SETTING FURTHER PROCEDURAL SCHEDULE (July 29, 2002), ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN (November 26, 2002).

[93] *In the Matter of Qwest Communications International Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, Application (*FCC § 271 Application*) Appendix B (SGAT), Exhibit K (PAP) § 16.4; Appendix E (PAP) § 16.4. The PAP was revised April 30, 2003, in the PAP Docket, *supra* n.92. (See http://www.qwest.com/wholesale/clecs/sgatswireline.html). See also *PAP Docket*, ORDER ON RECONSIDERATION AMENDING PERFORMANCE ASSURANCE PLAN, *supra*, at 5-6.

Qwest incorporated the PAP into its § 271 application to the FCC,[94] thereby agreeing to be bound by its terms.

2. Qwest's Wholesale Service Quality Plan for Minnesota

On July 3, 2003, the Commission issued an order approving a Wholesale Service Quality Plan for Qwest (MN WHSQ Plan). On July 22, 2003, the plan's final text was filed.

The PAP and the MN WHSQ Plan have a similar structure and most of the terms are identical, but the plans differ in at least three respects. First, the PAP generally directs Qwest to serve CLECs' wholesale needs on the same basis that it serves its own retail operations; in contrast, the MN WHSQ Plan contains more instances where Qwest is directed to meet fixed performance goals, called "benchmarks." Second, the PAP requires Qwest to make some of its payments into a fund to offset the cost of administering the plan; the MN WHSQ Plan permits more payments to flow directly to the aggrieved CLEC. Third, whereas Qwest agreed to be subject to the PAP, Qwest is contesting the application of the MN WHSQ Plan in court.

The first two differences may make the MN WHSQ Plan more attractive to a CLEC than the PAP. The legal uncertainty surrounding the MN WHSQ Plan, however, may diminish that plan's attraction.

C. The ALJs' Recommendation

In deciding how to incorporate the MN WHSQ Plan, the ALJs recommend adopting language proposed by the Department as follows:

> Section 20.2. The Parties hereby incorporate the Minnesota Wholesale Service Quality Plan, including all applicable remedies, found in Exhibit K of this Agreement, into this ICA. In the event that, for whatever reason, the MN WHSQ Plan is not effective (due to stay upon appeal etc.), the Parties agree to abide by the MPAP [Minnesota Performance Assurance Plan], including all applicable remedies, until the MN WHSQ Plan becomes effective and the CLEC readopts the MN WHSQ Plan into the ICA.

Qwest opposes this recommendation. Qwest notes that the PAP already provides a mechanism by which a CLEC may elect to receive the benefits of the MN WHSQ Plan instead of the PAP. In addition, Qwest argues that parties should not incorporate the MN WHSQ Plan into their ICAs until the legal status of that plan is resolved. Instead of adopting the ALJs' recommendation, Qwest asks the Commission to adopt the following proposal: If Qwest fails in all its efforts to secure an order reconsidering, modifying or staying the MN WHSQ Plan, then Qwest would amend the ICA to give AT&T the benefits of the Plan retroactive to the date of this Order. But if either the Commission or a court were to stay the effect of the MN WHSQ Plan, Qwest argues, then Qwest should not be liable for complying with the provisions of that Plan until after any such stay was lifted, even if Qwest's reasons for opposing the Plan are ultimately rejected.

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[94] *FCC § 271 Application* Appendix B, Exhibit K; Appendix E; as revised.

While Qwest argues that the ALJs' recommendation would unduly accelerate the adoption of the MN WHSQ Plan, MCI argues that the ALJs' recommendation would needlessly delay the Plan's implementation. MCI argues that if the Commission and the courts uphold the MN WHSQ Plan, then a CLEC should be entitled to receive the benefits of the Plan retroactive to the date the CLEC first adopted the plan – or at least retroactive to an effective date designated by the Commission or the courts. In furtherance of this policy, MCI asks the Commission to direct Qwest to provide an ongoing calculation of the liability it would have incurred under both the PAP or the MN WHSQ Plan throughout any period that the MN WHSQ Plan was stayed.

To accommodate Qwest's concerns, MCI did not object to incorporating Qwest's draft language noting Qwest's ongoing objection to the MN WHSQ Plan.

AT&T supports MCI's proposal. And while the Department had originally proposed the language that the ALJs incorporated into their recommendations, the Department did not oppose MCI's proposal as a substitute.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order – but in a modified form.

Qwest is entitled to the benefits of legal process, including the opportunity to have this Commission and the courts review orders for substantive and procedural defects. In equity, occasionally this process includes staying the effect of Commission orders while the merits of Qwest's arguments are reviewed. The MN WHSQ Plan Order may be an example of one such order.

But if Qwest loses its challenge of the MN WHSQ Plan, then there would be no equitable reason for Qwest to gain – and CLECs and their customers lose – from the delay caused by the challenge. Indeed, if Qwest were able to achieve such benefits even when its claims fail, then Qwest would have an incentive to seek to stay all manner of decisions, regardless of the merit of Qwest's claims, simply to achieve delay. The Legislature has directed the Commission to make its decisions in a manner that discourages litigation.[95] This directive would be frustrated if Qwest were able to gain permanent advantages by launching litigation regardless of the merits of its claims.

This legislative directive, combined with concerns for administrative efficiency and a sense of equity, lead the Commission to adopt language recommended by MCI. Regarding the inclusion of wholesale service quality standards in the agreement, the Commission will amend the ALJs' recommended language as follows:

> Section 20.2. The Parties hereby incorporate the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), including all applicable remedies, found in Exhibit K of this Agreement, into this ICA. In the event that, for whatever reason, the MN WHSQ Plan is not effective (due to stay upon appeal, etc.), the Parties agree to abide by the Minnesota Performance Assurance Plan (MPAP), including all applicable remedies, until the MN WHSQ Plan becomes effective and the CLEC

[95] Minn. Stat. § 237.011(8).

readopts the MN WHSQ Plan into the ICA. During the period the MN WHSQ Plan is not effective, Qwest shall keep a record of, and shall report to CLEC on a monthly basis, its performance under the MN WHSQ Plan and the amounts CLEC would receive under the MN WHSQ Plan in excess of the amounts payable under the MPAP.

If CLEC does readopt the MN WHSQ Plan, CLEC may elect to have such plan be effective as to CLEC on a prospective basis only or retroactively back to the later of (i) the date of CLEC's original adoption of the MN WHSQ Plan or (ii) the effective date of the MN WHSQ Plan determined by the relevant judicial or administrative agency once the period during which the MN WHSQ Plan was not effective terminates. Upon CLEC's readoption of the MN WHSQ Plan on a retroactive basis, Qwest shall compare the amounts due under the MN WHSQ Plan and the MPAP from the date upon which the MN WHSQ Plan is deemed effective as to CLEC, and the Parties shall true-up, with interest, the difference between the two.

Nothing in this provision shall constitute any waiver or admission by Qwest that the MN WHSQ Plan is lawful or valid or properly ordered, nor shall anything in this provision be construed as a waiver by Qwest of any objections, issues or arguments that Qwest has raised or may raise in connection with any appeal, remand, reconsideration, or further consideration of the MN WHSQ Plan in any forum.

While a court's decision may influence the relationship between Qwest and its CLEC customers, Qwest's decisions about litigation strategy should not. If the Commission was justified in adopting the MN WHSQ Plan, then the CLECs that choose this plan – and their customers – are entitled to those benefits regardless of Qwest's decision to contest the plan and seek a stay. The language set forth above is designed to ensure that CLECs and their customers receive all the benefits to which they are entitled without depriving Qwest of the due process rights to which it is entitled.

IX. BILLING

Issue No. 27: What format(s) should the parties use for the submission of bills to each other? (ICA Section 21.1.1.1 and Appendix 1)

A. The Issue

The Carrier Access Billing System (CABS) is a standard way of formatting billing information. An industry group revises this format biannually. Companies do not always conform to the CABS standards in every particular, but they typically maintain lists of how their formats differ from the CABS billing standard format. AT&T and Qwest agree that either party may request elimination of differences that "impair the billed Party's processing of the CABS bill" and that such issues may be pursued through the draft ICA's dispute resolution process.

That said, AT&T proposes that the ICA include a list of 10 aspects of the CABS standards to which Qwest's bills must conform. Qwest proposes that the ICA state merely that Qwest will work with CLECs through the ICA's change management process to resolve issues regarding these 10 aspects of the CABS standards. The Department favors AT&T's position.

B. Applicable Law

ILECs must provide nondiscriminatory access to network elements on an unbundled basis.[96] The FCC has determined that this obligation includes nondiscriminatory access to the billing systems necessary for CLECs to provide accurate and timely bills to their end users.[97]

C. The ALJs' Recommendation

The ALJs recommend adopting Qwest's language, reasoning that the change management process provides the appropriate means for AT&T to address its concerns.

AT&T opposes the ALJs' recommendation. First, AT&T emphasizes that the existence of a change management process as a vehicle for changing ICAs does not diminish the role of arbitrations as another vehicle for changing ICAs. To the contrary, AT&T notes that arbitrated changes to an ICA take precedence over changes developed through the change management process. Second, AT&T expresses frustration over its experience trying to implement change through the change management process. Finally, if the Commission wants to adopt Qwest's language offering to work toward a resolution of issues, then AT&T proposed that the Commission insert deadlines for resolving these issues, and consequences for failing to do so.

D. Commission Decision

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

AT&T is correct in observing that the existence of a change management process in no way precludes the use of arbitrations to change ICAs. AT&T is also correct that arbitrated terms take precedence over other terms generated through the change management process. Given the level of detail in these billing disputes, and the preclusive effect of arbitrated terms relative to other terms, the ALJs are justified in their reticence to establish terms via arbitration while the parties are working to resolve these issues through other means.

The Commission is always concerned to learn of parties not fulfilling their obligations under the terms of an ICA, and is generally sympathetic to the problems AT&T describes with using the change management process. Nevertheless, the kinds of allegations AT&T makes about its experience with the change management process do not lend themselves to resolution in the context of an arbitration. If AT&T believes that Qwest is abusing the process, AT&T should pursue further dispute resolution, potentially including a complaint to the Commission. That is a more appropriate forum for addressing the sorts of fact-intensive allegations AT&T raises.

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[96] 47 U.S.C. § 251(c)(3).

[97] *Qwest Nine-State Order* at ¶ 114.

Issue No. 34: How should Qwest, as the Local Primary IntraLATA Carrier, bill for intraLATA toll calls? (ICA Section 21.8)

A. The Issue

For regulatory purposes, North America is divided into roughly 200 regions called "local access and transport areas" (LATAs). Calls originating and terminating within the same LATA are known as intraLATA calls; calls crossing LATA boundaries are known as interLATA calls.

With the emergence of telephone competition, telephone subscribers may now select which carrier will provide their local service, which will provide their intaLATA toll service, and which will provide their interLATA toll service. The subscriber's choice of carrier to provide intraLATA toll service is known as the local primary intraLATA carrier (or the local primary interexchange carrier). Many CLECs, including AT&T, provide all three types of service. When a subscriber elects to receive service from a CLEC, the subscriber often elects to receive all three services from the CLEC.

But not always. Of all the subscribers who have elected to change their local service provider from Qwest to AT&T, roughly 35 subscribers did not also choose a new provider for intraLATA toll service. These customers continue to receive intraLATA toll from Qwest while they receive local service from AT&T.

Qwest claims that it does not have any practical means of billing such a small group of customers with whom it has no other business relationship. Qwest argues that AT&T could easily provide such a service, in that AT&T already bills these customers for their local service (and perhaps their interLATA toll service as well). AT&T is amenable to providing such a service for Qwest for a fee, but denies that this service should be – or even can be – the subject of compulsory arbitration under the Telecommunications Act of 1996. The Department also opposes imposing a resolution to this issue.

B. Applicable Law

The Commission has the authority to regulate billing and collection services. In the *Minnesota IntraLATA Toll Access Compensation Order,* the Commission detariffed billing and collection services and operator functions under powers granted by Minn. Stat. § 237.081.

C. The ALJs' Recommendation

The ALJs recommend adopting language supported by AT&T and the Department declaring that CLECs have no obligation to provide billing and collections services for Qwest's toll services. The ALJs reasoned that this is a matter that AT&T and Qwest should negotiate between themselves.

Qwest takes exception to this recommendation. Qwest contrasts the ALJs' recommendation on this matter with their recommendation for Issue 33. In the context of billing for "alternatively billed calls" (such as collect calls), the ALJs also recommended that Qwest and AT&T go negotiate their own arrangement. But in addition, the ALJs recommended adopting Qwest's proposal as an interim solution. Qwest argues that the Commission should adopt its position on an interim basis as negotiations continue.

D. Commission Decision

The circumstances surrounding the alternative billed call issue differ from the circumstances surrounding Qwest's intraLATA toll customers. Most significantly, the alternative billed call issue is larger: The number and identity of people making alternatively-billed calls changes constantly, and will continue to do so indefinitely. In contrast, the number of Qwest's intraLATA toll customers with whom Qwest has no other relationship is fixed, small, and will likely decline as Qwest's affiliate begins offering interLATA toll service in Qwest's service area. Consequently, the harm arising from leaving this matter unresolved is less, reducing the need for a Commission-imposed interim solution.

The Commission finds the ALJs' reasoning and recommendations persuasive, and will adopt and incorporate them into this Order.

ORDER

1. The Commission decides the arbitrated issues as discussed in the body of this Order. In summary, the Commission adopts the reasoning and recommendations of the Arbitrators' Report except as follows.

   Issue No. 1: Regarding the ability of a competitive local exchange carrier to obtain services from an agreement or tariff, the Commission adopts the position recommended by AT&T.

   Issue No. 24: Regarding Qwest's obligation to construct unbundled network element facilities for AT&T, the Commission adopts the position recommended by AT&T.

   Issue No. 26: Regarding the inclusion of wholesale service quality standards in the agreement, the Commission adopts the following language:

   > Section 20.2. The Parties hereby incorporate the Minnesota Wholesale Service Quality Plan (MN WHSQ Plan), including all applicable remedies, found in Exhibit K of this Agreement, into this ICA. In the event that, for whatever reason, the MN WHSQ Plan is not effective (due to stay upon appeal, etc.), the Parties agree to abide by the Minnesota Performance Assurance Plan (MPAP), including all applicable remedies, until the MN WHSQ Plan becomes effective and the CLEC readopts the MN WHSQ Plan into the ICA. During the period the MN WHSQ Plan is not effective, Qwest shall keep a record of, and shall report to CLEC on a monthly basis, its performance under the MN WHSQ Plan and the amounts CLEC would receive under the MN WHSQ Plan in excess of the amounts payable under the MPAP.
   >
   > If CLEC does readopt the MN WHSQ Plan, CLEC may elect to have such plan be effective as to CLEC on a prospective basis only or retroactively back to the later of (i) the date of CLEC's original adoption of the MN WHSQ Plan or (ii) the effective date of the MN

WHSQ Plan determined by the relevant judicial or administrative agency once the period during which the MN WHSQ Plan was not effective terminates. Upon CLEC's readoption of the MN WHSQ Plan on a retroactive basis, Qwest shall compare the amounts due under the MN WHSQ Plan and the MPAP from the date upon which the MN WHSQ Plan is deemed effective as to CLEC, and the Parties shall true-up, with interest, the difference between the two.

Nothing in this provision shall constitute any waiver or admission by Qwest that the MN WHSQ Plan is lawful or valid or properly ordered, nor shall anything in this provision be construed as a waiver by Qwest of any objections, issues or arguments that Qwest has raised or may raise in connection with any appeal, remand, reconsideration, or further consideration of the MN WHSQ Plan in any forum.

2. The parties shall submit final contracts containing all arbitrated and negotiated terms to the Commission for review pursuant to 47 U.S.C. § 252(e) within 30 days of this Order.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)